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16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 OAKLAND DIVISION

19

20 ORACLE USA, INC., *et al.*,

21 Plaintiffs,

22 v.

23 SAP AG, *et al.*,

24 Defendants.

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No. 07-CV-01658 PJH (EDL)

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' OBJECTIONS TO
EVIDENCE FILED IN SUPPORT OF
PLAINTIFFS' OPPOSITION TO
MOTION FOR PARTIAL
SUMMARY JUDGMENT
REGARDING HYPOTHETICAL
LICENSE DAMAGES CLAIM**

Date: October 28, 2008

Time: 9:00 a.m.

Courtroom: 3, 17th Floor

Judge: Hon. Phyllis J. Hamilton

Case No. 07-CV-01658 PJH (EDL)

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TO MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING HYPOTHETICAL LICENSE DAMAGES CLAIM

I. INTRODUCTION

2 Plaintiffs Oracle USA, Inc. et al. (“Oracle”) request that the Court deny the October 7,
3 2009 Objections to Oracle’s Evidence in support of Plaintiffs’ Opposition to Defendants’ Motion
4 for Partial Summary Judgment regarding Plaintiffs’ Hypothetical [Fair Market Value] License
5 Damages (“Defs’ Objections”) of Defendants SAP AG, SAP America, and TomorrowNow, Inc.
6 [Docket No. 509]. For the reasons set forth below, Defendants’ Objections are meritless.

II. ARGUMENT

8 As a threshold matter, the burden on Oracle to justify the Court’s consideration of the
9 evidence about which Defendants complain is not onerous. A party opposing summary
10 judgment need not “produce evidence in a form that would be admissible at trial in order to
11 avoid summary judgment.” *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003). Rather,
12 Oracle need only to show that a genuine dispute exists as to a material fact. *See* Fed. R. Civ.
13 P. 56. A fact is “material” if it might affect the outcome of the suit under the governing
14 substantive law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual
15 dispute is “genuine” where “the evidence is such that a reasonable jury could return a verdict for
16 the non-moving party.” *Id.*; *see also* Plaintiffs’ September 23, 2009 Opposition to Defendants’
17 Motion for Partial Summary Judgment regarding Plaintiffs’ Hypothetical [Fair Market Value]
18 License Damages [Docket No. 483] (“Plaintiffs’ Opp.”) at Section G.

A. The Meyer Declaration Is Entirely Relevant and Admissible

1. The Meyer Declaration Is Relevant to the Hypothetical License Damages Claim

22 Defendants assert that the only issue raised by their pending Motion for Partial Summary
23 Judgment (“MSJ”) is whether a hypothetical license is an available measure of Oracle’s actual
24 damages for Defendants’ copyright infringement “in light of Plaintiffs’ inability to prove that,
25 but for the infringement, the parties would have agreed to a license.” *See* Defs’ Objections
26 p. 1:17-18. Defendants’ argument rests upon an incorrect reading of the law as reflected in
27 Defendants’ moving papers. As Oracle’s Opposition demonstrates, the availability of a
28 hypothetical license is not predicated on proving that a meeting of the minds would have

1 definitely occurred. *See* Plaintiffs' Opp. pp. 1-9.¹ Instead, the question of the availability of any
 2 hypothetical license fee Oracle proffers through its damages expert depends on the
 3 reasonableness of the claimed fair market value of the infringed works (*i.e.*, that it is not
 4 "speculative"), and the appropriateness of the methodology used to establish that value. *See id.*
 5 pp. 1:9-14; 4-9; 11:10-16; 14-16. This is the subject matter of the Meyer Declaration and the
 6 extensive evidence he provides in support on the relevant factors considered in copyright
 7 valuation and which bears on what the fair market valuation should be. *See id.* at Section II.F(1)
 8 and (2) (citing IP valuation texts and numerous cases using the very factors Mr. Meyer uses to
 9 establish the fair market value of infringed copyrighted material). Thus, the Meyer Declaration
 10 is highly relevant. *See* Fed. R. Evid. 401 ("relevant evidence" means "evidence having any
 11 tendency to make the existence of any fact that is of consequence to the determination of the
 12 action more probable or less probable than it would be without the evidence").

13 **2. The Meyer Declaration Should Not Be Rejected On The Grounds
 14 That He Has Not Finished His Expert Analysis**

15 Defendants' argument that the Meyer Declaration should not be considered because it is
 16 "an improper and incomplete expert opinion" (Defs' Objections p. 1:21-25) is remarkable given
 17 that Defendants insisted that their MSJ be heard before the fact discovery cut-off and the expert
 18 opinions disclosure deadline. It is well-established that a moving party may not railroad the non-
 19 moving party's expert discovery by filing an early summary judgment motion. *See Celotex*
 20 *Corp. v. Catrett*, 477 U.S. 317, 326 (1986). Defendants cannot use the benefit of an early
 21 summary judgment motion to assert, long before any expert report is due under the current case
 22 schedule, that such expert report should be ignored because it is "not based on sufficient facts or
 23 data." *See* Defs' Objections p. 1:21-25. If the Meyer Declaration was somehow inadequate to
 24 support Oracle's opposition to Defendants' early summary judgment motion, the state of play of
 25 _____

26 ¹ Indeed, if an infringer need only claim it would not under any circumstances agree to pay a
 27 reasonable license fee for the intellectual property it chose to use improperly, the infringer could
 unilaterally prevent the copyright-owner from recovering appropriate damages.

1 the fact discovery and expert analysis provides grounds to continue the hearing to allow
 2 additional time for the expert to complete the report, if necessary. *See* Fed. R. Civ. P. 56(f).
 3 However, the Meyer Declaration is not inadequate just because his expert analysis is not final; as
 4 set forth above, the highly relevant information it contains should and can give the Court comfort
 5 that Oracle has ample basis using well recognized IP valuation methodologies and accepted
 6 factors under case law to arrive at the fair market value of the years of massive infringement by
 7 Defendants. *See* Plaintiffs' Opp. at Section II.F(1) and (2) (citing IP valuation texts and
 8 numerous cases using the very factors Mr. Meyer uses to establish the fair market value of
 9 infringed copyrighted material). Notably, Defendants do not raise any argument concerning Mr.
 10 Meyer's analysis or conclusions to date and do not and cannot provide any legal reason for the
 11 Court to ignore any portion of his Declaration and its accompanying evidence.

12 **3. Mr. Meyer's Cited Evidence on Future Up-Sell and Cross-Sell
 Opportunities Is Relevant to the Fair Market Value for the
 Infringed Material**

14 Even though Defendants explicitly did not seek evidence preclusion as to Oracle's
 15 hypothetical fair market valuation measure of copyright damages in their recent Rule 37 Motion
 16 to Magistrate Laporte, Defendants try to bootstrap Magistrate Laporte's September 17, 2009
 17 Order precluding certain cross-sell and up-sell evidence related to Oracle's alternate lost profits
 18 measure of damages for specific customers [Docket No. 482] into a means to preclude Oracle's
 19 damages expert's consideration of cross-sell and up-sell evidence relevant to Oracle's fair market
 20 value license measure of actual copyright damages. *See* Defs' Objections pp. 1:26-28; 2:1-7.
 21 The evidence at issue is testimony by Oracle's executives on the fact that customers acquired in
 22 an acquisition are valued on the forecasted total purchases they are likely to make, including
 23 future purchases of other products and services. *See e.g.*, Meyer Decl. ¶¶ 31-36 and Exs. 18, 22,
 24 34-37 thereto. Several of the responses at issue were made to questions by Defendants' counsel
 25 on the issue of the value of Oracle's hypothetical licenses with SAP. *See* Plaintiffs' Opp. pp.
 26 20:5-22-23:1-5. None of the testimony referenced the specific lost profits associated with the
 27 identified list of TomorrowNow customers at issue in Defendants' Rule 37 Motion to Magistrate
 28 Laporte and precluded by Magistrate Laporte's Order. *Id.*; *see also* Defendants' Reply to

1 Plaintiffs' Opposition to Defendants' MSJ pp. 7:4-28; 8:1-25.

2 Mr. Meyer explains that this evidence is relevant to the fair market valuation of the
 3 hypothesized licenses because it would be a key consideration of both parties. He made clear in
 4 his declaration that he was not relying on the material for his lost profits analysis — which was
 5 precluded by Magistrate Laporte — and cited Defendants' part of their Rule 37 Motion where
 6 they explicitly limited the relief sought to Oracle's lost profits measure of damages:

7 I am relying on this form of Oracle executive management
 8 testimony not to quantify the lost profits associated with lost
 9 cross-sell and up-sell opportunities to the specific list of lost
 10 TomorrowNow customers (which I understand Magistrate Laporte
 11 has disallowed per her September 17, 2009 lost profits damages
 12 preclusion order), but as input of the considerations that would
 13 inform and be relevant to Oracle's reasonable fair market value
 14 negotiations of licenses structured to allow Defendants to use the
 15 allegedly infringed materials. I understand that Defendants
 16 specifically did not seek preclusion of this measure of Oracle's
 17 copyright damages in that motion. *See* Defendants' July 14, 2009
 Motion for Sanctions Pursuant to Fed. R. Civ. P. 37(c) and 16(f) at
 13 n.9 ("This motion is limited to what Oracle characterizes as its
 lost profits claims, and does not extend to its 'infringers'
 profits/unjust enrichment claims, its hypothetical license theory, or
 alleged damage to computer systems or data. Defendants do not
 concede that any of these other damages categories or theories are
 proper or timely, but will address those by separate motion if
 necessary. For example, Oracle's hypothetical license theory will
 be the subject of Defendants' Rule 56 motion to be filed on August
 26th.").

18 Meyer Declaration at p. 22:20-27 (n.17).

19 Because the cited evidence is relevant to establishing the fair market value of Oracle's
 20 hypothetical license fees and because Defendants did not move to preclude it for that purpose,
 21 Defendants' objection to the Court's consideration of such evidence should be overruled.

22 **B. The Ellison Declaration is Entirely Relevant and Admissible**

23 Defendants' characterization of Mr. Ellison's Declaration as constituting a description as
 24 to "how Mr. Ellison would calculate a hypothetical license for copyright damages purposes", and
 25 a "sham", (Defs' Objections pp. 2-3) does not make it so.

26 The Ellison Declaration is admissible and relevant evidence from an Oracle Executive
 27 supporting facts of consequence, including how Mr. Ellison had understood Defendants' counsel
 28 had broadly defined the relevant hypothetical license, how the Protective Order had barred him

1 from being privy to the scope of Defendants' infringement which defines the scope of the
 2 hypothetical licenses, what he would have considered at the time of any hypothesized license
 3 negotiation with SAP and the parties' ability to agree on prior significant royalty arrangements
 4 despite their fierce competitiveness. *See* Declaration of Larry Ellison. Defendants would like
 5 the Court to disregard Mr. Ellison's testimony, but they are not entitled to so restrict the
 6 evidence.

7 **1. Defendants' Arguments that Mr. Ellison's Declaration Is A Sham
 Fail²**

8 Defendants assert that paragraphs 4 and 6 of Mr. Ellison's Declaration in support of
 9 Oracle's MSJ Opposition flatly contradict his deposition testimony and thus must be stricken.
 10 *See* Defs' Objections p. 2:25-27. But Defendants do not and cannot point to any such
 11 contradiction. Indeed Oracle showed in its Opposition exactly how Mr. Ellison's testimony
 12 undermined Defendants' claim that the parties would never agree. *See* Plaintiffs' Opp. to MSJ at
 13 Section F.3. Oracle further showed how Defendants' counsel's inartful questioning muddied the
 14 resulting responses and that Defendants never asked Oracle executives about the particular
 15 licenses that Oracle's damages expert will value here. *See id.* at pp. 20-23:1-5.

16 A non-moving party is not precluded from elaborating upon, explaining, or clarifying
 17 prior testimony elicited by opposing counsel at deposition. *Messick v. Horizon Industries Inc.*,
 18 62 F.3d 1227, 1231 (9th Cir. 1995) ("Mohawk contends that the affidavit submitted by Messick
 19 in opposition to the motion for summary judgment should not be considered because it
 20 'contradicted his deposition testimony.' . . . Mohawk's argument amounts to no more than a
 21 series of quibbles about peripheral details in the deposition and the affidavit. While this court has
 22 held that a party may not 'create his own issue of fact by an affidavit contradicting his prior
 23

24 _____
 25 ² Defendants' "sham" declaration arguments are improperly presented in their Reply to
 Plaintiffs' Opposition to Defendants' MSJ and their arguments include attacks on Oracle witness
 26 credibility. *See* Defs' Reply to Plaintiffs' Opposition to MSJ [Docket No. 504] p. 7 ¶ 1. Courts
 27 may not weigh evidence or draw credibility determinations when finding whether there is a
 genuine issue for trial in ruling on a motion for summary judgment. *See Liberty Lobby, Inc.*, 477
 U.S. at 249-255.

1 deposition testimony', the non-moving party is not precluded from elaborating upon, explaining
 2 or clarifying prior testimony elicited by opposing counsel on deposition; minor inconsistencies
 3 that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis
 4 for excluding an opposition affidavit.") (internal citations omitted). The Ninth Circuit has held
 5 in a number of cases that a declaration is not a sham when it merely explains or clarifies earlier
 6 testimony. *See, e.g., Scamihorn v. General Truck Drivers*, 282 F.3d 1078, 1085 n.7 (9th Cir.
 7 2002).

8 In essence, Defendants' sham declaration argument is a complaint that Mr. Ellison, in his
 9 declaration, clarified and explained his testimony in a way that is more favorable to Oracle than
 10 the spin Defendants' placed on his testimony in their moving papers. Such explanations are
 11 permitted and "it is immaterial at the summary judgment stage that the opposing evidence is self-
 12 serving." CALIFORNIA PRACTICE GUIDE, FEDERAL CIVIL PROCEDURE BEFORE TRIAL, W.
 13 Schwarzer, A. Tashima & J. Wagstaffe at ¶ 14:101b, ¶ 14:145.4 (The Rutter Group 2009).

14 For these reasons, no portion of Mr. Ellison's Declaration should be stricken as a "sham."

15 **2. Defendants' Objections to The Ellison Declaration's References to
 16 Oracle's Database Reseller Agreement Are Meritless**

17 Defendants do not deny the existence of the long-standing Oracle/SAP database reseller
 18 agreement nor the massive amounts of royalties SAP has paid Oracle under it. Nor do they deny
 19 that this evidence undermines the one purported "undisputed" fact they claim is relevant in their
 20 pending MSJ — their claim that the parties would never agree on the terms of a significant
 21 license. Rather, Defendants assert that Mr. Ellison's description in his Declaration of Oracle's
 22 database reseller agreement "lacks foundation" — baldly claiming that Mr. Ellison does not have
 23 personal knowledge of this matter. *See* Defs' Objections p. 3:1-16. Defendants provide no
 24 factual support for their Objection. Moreover, they ignore that Mr. Ellison attested he had
 25 "personal knowledge of the facts" stated in his declaration. *See* Ellison Decl. ¶ 1. It is not
 26 surprising that Mr. Ellison would know about the existence of the long-standing agreement
 27 between Oracle and its biggest rival and would know that it had secured for Oracle massive
 28

1 royalties, and the Court has no basis for rejecting his proffer of this evidence. *Cf. Barthelemy v.*
 2 *Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (finding positions and knowledge of
 3 company chairman and of investment banker supported their affidavits).

4 Defendants' "best evidence rule" objection (presumably meaning that the parties should
 5 either have submitted their voluminous reseller agreement or submitted accounting documents
 6 confirming the royalties SAP has paid Oracle under it) is baseless because it disregards the
 7 standard for reviewing evidence submitted in opposition to a motion for summary judgment. A
 8 party opposing summary judgment need not "produce evidence in a form that would be
 9 admissible at trial in order to avoid summary judgment." *Goodale*, 342 F.3d at 1036 ("At the
 10 summary judgment stage, we do not focus on the admissibility of the evidence's form. We
 11 instead focus on the admissibility of its contents.") (internal citations omitted). The contents of
 12 the database reseller agreement are admissible, and are facts attested as being within Mr.
 13 Ellison's personal knowledge. Indeed, even at trial, depending on the circumstances, the
 14 database reseller agreement facts could be admitted into evidence without resort to such
 15 additional documentation. Mr. Ellison could testify to all the relevant portions of the database
 16 reseller agreement from his personal knowledge. *See e.g.*, *Goodale*, 342 F.3d at 1036 (noting
 17 same in similar factual circumstance); Fed. R. Evid. 602. If he forgets the exact details, he could
 18 use the database reseller agreement to refresh his recollection. *See e.g.*, *Goodale*, 342 F.3d at
 19 1036; Fed. R. Evid. 612.

20 Finally, Defendants' hearsay objection is also baseless because it too disregards the
 21 standard for allowing evidence submitted in opposition to a motion for summary judgment.
 22 Aside from the fact that Mr. Ellison's Declaration is admissible for the non-hearsay purpose of
 23 showing his understanding of the database reseller agreement, even if a declaration is hearsay, a
 24 declaration may be considered on a motion for summary judgment if it: (i) is based on personal
 25 knowledge, (ii) sets forth *facts* that would be admissible in evidence, and (iii) shows that the
 26 declarant is competent to testify on the matters stated. Fed. R. Civ. P. 56(e)(1). Whether a
 27 declaration contains hearsay or not is of no import under the requirements of Fed. R. Civ.
 28 P. 56(e)(1). For the reasons set forth above, the portion of Mr. Ellison's Declaration on the

1 parties' database reseller agreement satisfies the requirements of Fed. R. Civ. P. 56(e)(1).

2 Though Defendants understandably would prefer the Court not consider Mr. Ellison's
 3 testimony on the parties' database reseller agreement and the payments SAP has made to Oracle
 4 under it — as this evidence torpedoes their claimed "undisputed fact" that these fierce
 5 competitors would never agree on a significant payment from SAP to Oracle for valuable
 6 rights — there is no evidentiary basis for precluding its consideration.

7 **C. The Catz Declaration Also Is Relevant and Not A "Sham"**

8 Defendants' identical characterizations of Ms. Catz's Declaration as constituting an
 9 irrelevant description as to "how Ms. Catz would calculate a hypothetical license for copyright
 10 damages purposes", and a "sham", also do not make it so. *See* Defs' Objections pp. 3:23-28; 4.

11 As with Mr. Ellison's Declaration, Ms. Catz's Declaration is admissible and relevant
 12 evidence from an Oracle Executive supporting facts of consequence including how Ms. Catz had
 13 understood Defendants' counsel had broadly defined the relevant hypothetical license, how the
 14 Protective Order had barred her from being privy to the scope of Defendants' infringement
 15 which defines the scope of the hypothetical licenses, and what she would have considered at the
 16 time of any hypothesized license negotiation with SAP. *See* page 4 ¶ B above; Catz Decl.; *see*
 17 *also* Plaintiffs' Opp. pp. 21-23:1-5; Fed. R. Evid. 401.

18 Second, like Mr. Ellison's Declaration, no portion of Ms. Catz's Declaration is a "sham."
 19 Defendants assert that paragraph 4 of Ms. Catz's Declaration in support of Oracle's MSJ
 20 Opposition flatly contradicts her deposition testimony and thus must be stricken. *See* Defs'
 21 Objections p. 4:6-13. But Defendants do not and cannot point to any such contradiction. Indeed,
 22 Oracle showed in its Opposition exactly how Ms. Catz's testimony undermined Defendants'
 23 claim that the parties would never agree. *See* Plaintiffs' Opp. to MSJ at Section F.3. As with
 24 Mr. Ellison's testimony, Oracle further showed how Defendants' counsel's inartful questioning
 25 of Ms. Catz muddied the resulting responses and that Defendants never asked her about the
 26 particular licenses that Oracle's damages expert will value here. *See id.*

27 As explained above, a non-moving party is not precluded from elaborating upon,
 28 explaining, or clarifying prior testimony elicited by opposing counsel at deposition. *Horizon*

1 *Industries Inc.*, 62 F.3d at 1231. Again, the Ninth Circuit has held, in a number of cases, that a
 2 declaration is not a sham when it merely explains or clarifies earlier testimony. *See, e.g.*,
 3 *General Truck Drivers*, 282 F.3d at 1085 n.7.

4 In addition, as with Mr. Ellison, Defendants' sham declaration argument against Ms Catz
 5 is merely a recasting of a self-serving declaration argument and such declarations are allowed in
 6 opposition to summary judgment. CAL. PRAC. GUIDE, FED. CIV. PROC. BEFORE TRIAL,
 7 Schwarzer, Tashima & Wagstaffe at ¶ 14:101b, ¶ 14:145.4.

8 For these reasons, as with Mr. Ellison's Declaration, no portion of Ms. Catz's Declaration
 9 should be stricken as "sham."

10 **III. CONCLUSION**

11 For the reasons set forth above, Defendants' Objections to Evidence should be denied in
 12 full and the evidence objected to should be considered in support of Plaintiffs' Opposition to
 13 Defendants' Motion for Summary Judgment.

14 DATED: October 21, 2009

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By: _____ /s/ Holly A. House
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